No. 12139

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANGEL L. PACK,

Appellant,

vs.

UNITED STATES OF AMERICA, and LILLY PACK,

Appellees.

APPELLANT'S PETITION FOR REHEARING.

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APPELLANT'S PETITION FOR REHEARING.

To the Honorable, the Court of Appeals for the Ninth Circuit:

Comes Now the Appellant, Angel L. Pack (plaintiff below), and respectfully petitions for a re-hearing of the above-entitled appeal, and for a reconsideration of and modification of the judgment of this Court, wherein this Court affirmed the judgment of the District Court, *in toto.*

Plaintiff's complaint contained three counts.

The *first* count need not be considered, as appellant stipulated to facts which negatived relief thereunder.

The *second* count of the complaint was against both the Government and appellee Lilly Pack, wherein appellant sought to assert a vested interest in proceeds of National service Life Insurance, based upon the community prop-

erty laws of California. The majority opinion held that such right *could not be asserted against the Government.*

The *third* count [Tr. 5], named appellee Lilly Pack as the *sole* defendant, sought to impress a trust upon the proceeds of the insurance as against the mother, Lilly (the named beneficiary), in favor of the wife, Angel, petitioner herein, based upon her community interest under the community property laws of the State of California, or otherwise afford her protection against the attempted wrongful gift of her vested interest to the mother, without the wife's consent, the premiums having been wholly paid with community funds of the deceased insured and the wife.

Appellant, under the third count (brought against the mother, as the *sole* defendant) sought relief and protection against such unjust enrichment, in the light of the admitted fact that no payments had yet been made to the mother under the insurance, to require the mother to make an assignment to the wife of one-half of the insurance, as authorized by 38 U. S. C. A. 816, upon equitable principles which are well established.

The assertion of such right, by petitioner, against the named beneficiary, was brushed aside in the majority opinion, upon jurisdictional grounds, none of which were urged or raised below, or considered by the trial Court, or urged by the appellees in their briefs. This Court stated, in the majority opinion:

> "There was no jurisdiction to determine whether the proceeds, once received, should be held under some kind of a trust for the benefit of the appellant, or

whether Lilly Pack should be compelled to execute an assignment of one-half [of] the proceeds to the appellant, assuming such an involuntary executed assignment to be authorized by 38 U. S. C. A. 816."

This petition for rehearing is based upon the ground that the District Court *did* have jurisdiction to pass upon the claim of petitioner against appellee Lilly Pack, as asserted against her, alone, in the *third* cause of action of appellant's complaint. It is the view of petitioner that the dissenting opinion, filed by Judge Stephens, clearly asserts jurisdictional elements presented by such claim, which were apparently entirely overlooked in the majority opinion.

None of the grounds which the majority opinion asserts, as to want of jurisdiction over the third count, or parties, were presented in the Court below, or upon this appeal, by appellees, and appellant has not been given any opportunity to meet any of them, which the majority of this Court raised *sua sponte*.

While lack of jurisdiction may be raised at any time, appellant earnestly insists that all of the grounds upon which the majority opinion asserts such lack of jurisdiction are, in fact, matters in abatement and are procedural, and do not go to jurisdiction, and could not be raised for the first time, upon appeal.

Appellant believes that the majority of this Court overlooked the clear waiver, in the record, by appellees, as to each of the matters which this Court has urged against

the maintenance of appellant's third count, that each of them may be waived by litigants, and that, after trial, a Circuit Court is without power to make and rule upon matters in abatement and procedural motions which were waived by the litigants, themselves.

Appellant feels that she should at least *be given the opportunity* of presenting her arguments, aimed at these new points raised and decided by the majority of this Court, *ex parte.*

Since the majority opinion affirms, *in toto,* the judgment of the District Court, rendered against appellant as to all three counts of her complaint, *on the merits,* it is feared that the decision, in its present form, may be *res judicata* as against appellant, Angel L. Pack, upon a subsequent assertion of her claim against appellee Lilly Pack, in a separate action, even though this portion of the appeal was denied solely upon jurisdictional grounds.

Petitioner earnestly asserts that the correct rule to be applied to the issues raised by the *third* count of her complaint and by the answer of Lilly Pack, thereto, is that contained in the dissenting opinion, wherein Judge Stephens stated:

> "By appropriate provision in the judgment, the district court should have decreed protection to the wife as to any interest she should have in benefits which may be paid to the mother."

In this connection, it is to be pointed out that the District Court *did* take jurisdiction and, upon the stipulated

facts, *did* define the rights of both claimants under the *third* count, it being the position of appellant that the District Court erred in its conclusions of law and judgment that plaintiff, below (appellant, here), take nothing as against Lilly Pack under *any* of the counts of her complaint.

These views will be emphasized in the argument presented herewith.

In her limitation of this petition to her claims against appellee Lilly Pack, alone, under the *third* count of her complaint (thus eliminating all reference to the propriety of the determination, by this Court, that the vested right of appellant as to one-half of the insurance, by reason of the California community property laws, "cannot be asserted *against the Government*"), appellant does not concede that such determination, which relates *solely* to her second count of her complaint, is correct. [Compare *Schaull v. U. S.*, 161 F. 2d 891, which directly holds that such a claim *can* be asserted against the Government, and impressed a trust upon the proceeds of Government insurance.]

Importance of Decision.

If the judgment of this Court is to stand, as rendered:

(1) Appellant may be barred from ever again filing any action against Lilly Pack, to recover under her admitted rights (*Wissner v. Wissner,* 89 A. C. A. 857, 210 P. 2d 837, hearing denied by Calif. Supreme Court), and to impress a trust (*Schaull v. U. S.,* 161 F. 2d 891), on the grounds that the judgment of the District Court, so affirmed (which judgment was upon the merits), was *res judicata.*

(2) This Court did not pass upon the question as to whether or not appellant's *third* count stated a claim against Lilly Pack, the mother, upon which relief could be granted, or whether or not the judgment of the District Court, denying appellant wife all relief, was sound, leaving wholly unsettled the timely, important and pressing question as to whether the Federal Courts may grant relief to a wife as against the beneficiary named without her consent, where the insured and his wife were residents of a "community property" state and all premiums (as here) were paid with community property, the wife did not consent to such designation, and the Government is not a party to the action.

Appellant respectfully urges that the question should not have been by-passed on jurisdictional grounds (which grounds appellant hopes to demonstrate are not tenable).

This is a case of *first impression* in the Federal appellate Courts.

According to the law digests in Vol. III of *Martindale-Hubbell Law Directory,* 1948, every state in this Circuit, excepting Montana, has or has had community property

statutes under which a wife could assert the identical rights which appellant asserts against appellee Lilly Pack.

Mr. Hoffmann, one of appellant's counsel, is National Judge Advocate of the Disabled American Veterans, a Federal corporation created by an Act of Congress (36 U. S. C. A. 90a-90k, as amended), and had hoped that both of the questions squarely raised by the appeal would be as squarely decided, viz.:

(a) Can the wife assert her vested interest in National Service Life or other Government insurance, as against the Government, in an action brought udner 38 U. S. C. A. 445 and 617? (Point I, Appellant's [Opening] Brief.)

(b) If not, then, *as between the wife and the named beneficiary,* designated by the husband without the wife's consent, does the latter hold one-half of the proceeds in trust for the widow, where the insurance premiums were paid wholly from community property of the wife and the insured? (Point II, Appellant's Brief.)

In the Court, below, the issues were narrowed to those two specific questions, and to none others. All of the facts required for a clear-cut, unequivocal determination of each of those two questions were squarely pleaded and stipulated. No question as to the weight of the evidence entered into the lower Court's determination of the law, or upon the appeal.

The determination of both of those questions is of utmost concern to thousands of widows of servicemen who lost their lives during World War II in the defense of their country, who were residents of the six "community property" states in this Circuit. It is of utmost con-

cern, also, to those widows who were residents of other states having "community property" laws, like California's, for a final determination of those two questions by this Court would undoubtedly be followed in other Circuits.

These widows fall into two general classifications: (1) they were married to the serviceman *before* the Government insurance, naming another as beneficiary, was issued, or (2) married the serviceman *after* the issuance of the policy.

Under the first classification, many servicemen knew the community property of the state of their residence, and also knew that they were not permitted to name *two* beneficiaries under one Government policy. Desiring, however, to leave one-half of the insurance to a parent, they named the parent as beneficiary, relying upon the fact that the state law gave the wife a vested interest in the other half, and thereby intended to protect her to that extent.

Under the second, the servicemen named a parent as sole beneficiary, when unmarried. The decisions in all Circuits demonstrate that many of them actually changed such designation, after marriage, from the parent to the bride, but that due to the circumstance that several millions of men were in the armed forces, and a large majority were serving overseas, under combat conditions, their written change of beneficiary was lost or misfiled, and never reached the Veterans' Administration. Many, too, fully intended to make such a change of beneficiary, but were killed in action or died before being able to do so. The wife's vested interest would not be to a full one-half, under this classification, in most instances, but would be based upon the proportion of premiums paid before and after

marriage. However, the wife would be afforded some protection and security, and the desires of the serviceman would not be thwarted, if an affirmative answer is clearly made to the second question, above posed, and directly presented upon this appeal.

In the instant case, appellant comes directly within the foregoing first classification. She is the mother of the insured's two children [Par. IV, Tr. 3 and 34]. Under the broad, unrestricted general affirmance of the judgment of the trial Court, by the majority of this Court, appellant may be forever barred from recovery against Lilly (upon the latter's plea of *res judicata*). If not, appellant urges that the filing of a new suit is unnecessary, the District Court having jurisdiction over the cause and the parties, uder the third count of the complaint, and to require her to unnecessarily file such suit would subject her to great delay and expense in filing suit against Lilly in Missouri (unless Lilly should *again* consent to be sued in Southern California).

Counsel are limited to an attorney's fee of 10% (38 U. S. C. A., 551 and 817), payable in driblets and then only if the appellant eventually prevails, even though this appeal finally is decided by the Supreme Court. They have advanced most of the costs of the appeal. But they, like the leading nationally chartered veterans' organizations, are desirous of having *both* of the two questions hereinbefore urged clarified and determined, *on the merits,* in the public interest.

Summary of Argument.

I.

The District Court had jurisdiction to determine the issues between the wife and mother, under the third count.

II.

Joinder of the third count did not oust the District Court of jurisdiction and, if improper, the error, if any, was waived.

III.

Even *if* joinder of third count was error, and not waived, court was not thereby ousted from jurisdiction.

IV.

This Court is without power to consider error relating to matters in abatement which did not involve jurisdiction.

ARGUMENT.

I.

The District Court Had Jurisdiction to Determine the Issues Between the Wife and Mother, Under the Third Count.

Jurisdiction as to the third count of the complaint (as distinguished from *venue*), under which appellant asserts a claim against appellee Lilly Pack, alone, and as to which the Government is not named or made a party, is founded upon Sections 1331 and 1332, Title 28, U. S. C. A. (new) [28 U. S. C. A. 41(1) prior to the effective date of the new Judicial Code], as well as upon 38 U. S. C. A. 445. (App. Op. Br. p. 2.)

The matter in controversy under that third count exceeds $3,000.

The action is between citizens of different states. It was both pleaded and stipulated by all parties that appellant was and is a citizen of California and that Lilly Pack is a citizen of Missouri. [Tr. p. 22, pars. VIII and X; p. 34; p. 15, par. IV.]

Consequently, all of the jurisdictional requirements of Section 1332, Title 28 U. S. C. A., were squarely met. It is significant that neither of the appellees have ever claimed otherwise.

Lilly Pack filed a cross-claim, affirmatively asserting all the jurisdictional requirements of Section 1332. [Tr. pp. 14, 15.]

This Court, in the majority opinion, states that Lilly "was presumably brought under the jurisdiction" of the District Court under the special provisions of 38 U. S. C. A. 445. That is not correct. She was originally named as a defendant [Tr. pp. 2-7], and the complaint was not

amended; she was *not* brought in as a third-party defendant; she was served with process; she appeared and filed her answer to all three counts, without reservation, and *filed no objections* as to venue, joinder, or otherwise.

If appellant is but given the opportunity, she will urge, as she does now, that this Court also failed to fully consider that the District Court *had jurisdiction* to award and grant to appellant the protection and relief which she sought under *both* the second and third count; in other words, that by reason of 38 U. S. C. A. 445 and 817, the District Court was given express and full authority to adjudicate *all claims* asserted under the insurance, including the claim of appellant that Lilly Pack was the trustee of appellant as to one-half of the proceeds, and had *jurisdiction* to decree that the Government pay such one-half directly to appellant or, at least, that it had jurisdiction to require Lilly to qualify as a trustee, give bond, and direct her to make payment of one-half of each installment of insurance as received by her; and it had *jurisdiction* to require Lilly to make an assignment of one-half of the insurance to appellant, and thus fulfill her duties as an involuntary trustee.

Schaull v. U. S. (C. C. A.-D. C., 1947), 161 F. 2d 891.

The *Schaull* case is directly in point, and appellant has been unable to find any decision to the contrary.

Where the challenge is merely of the jurisdiction of the Court for the particular district, the objection is to *venue*. This privilege (of not to be sued elsewhere), can be waived.

Peoria etc. Ry. v. U. S., et al. (1924), 263 U. S. 528, 535, 44 S. Ct. 194.

Chapter 85, Title 28 U. S. C. A. (New), "District Courts; Jurisdiction," which includes Sections 1331 and 1332, relates solely to the *jurisdiction* of those Courts, and nowhere therein is reference made to venue.

Chapter 87, which follows, deals solely with "District Courts; Venue," and by Section 1406 (Title 28, U. S. C. A.) expressly provides:

> "(b) Nothing in this chapter shall impair the jurisdiction of a district court of *any* matter involving a party *who does not interpose timely and sufficient objection to the venue.*"

The "Reviser's Notes" to the new Title 28, commenting upon Section 1406(b) thereof, above quoted, state:

> "Subsection (b) is declaratory of existing law. (See *Panama R. R. Co. v. Johnson,* 1924, 44 S. Ct. 391, 264 U. S. 375.) *It makes clear the intent of Congress that venue provisions are not jurisdictional but may be waived.*" (Emphasis added.)

A party waives the privilege of venue by pleading to the merits, without raising any objection to venue, as did Lilly Pack.

> *Department Water & Power v. Anderson* (C. C. A., 9, 1938), 95 F. 2d 577, 582 (cert. den. 305 U. S. 607);
>
> *Panhandle etc. Co. v. Federal Power Commission* (1945), 324 U. S. 635, 639, 65 S. Ct. 821:

> "The right to have a case heard in the court of proper venue may be lost unless seasonably asserted.

It may be waived by any party, *including the government.*"

Schaull v. U. S. (C. C. A.-D. C., 1947), 161 F. 2d 891, at 894, *an action based on a Government insurance policy, which sought to impress a trust upon the proceeds,* wherein it held:

"Two defendants . . . answered and pleaded to the merits without reservation; they are for that reason also unable to challenge the Court's jurisdiction over them."

Neirbo Co. v. Bethlehem Shipbuilding Corp. (1939), 308 U. S. 165, 60 S. Ct. 153 (cited in dissenting opinion of Judge Stephens).

II.

Joinder of the Third Count Did Not Oust the District Court of Jurisdiction and, If Improper, Error, If Any, Was Waived.

Appellee Lilly Pack did not make any objection to the joinder of the third count.

A defendant may elect to defend two or more actions, or unrelated counts, in one suit, and by pleading to several counts, without objection, irrevocably makes such election and waives all defects as to joinder.

Rule 12(h), Federal Rules Civil Procedure:

"A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply" (followed by exceptions not here applicable).

Capital Fire Ins. Co. v. Langhorne (C. C. A. 8, 1948), 146 F. 2d 237, at 242-243.

III.

Even If Joinder of Third Count Was Error, and Not Waived, Court Was Not Thereby Ousted From Jurisdiction.

The appellees at no time raised any objection as to joinder of causes or parties—whether in the Court, below, or here.

The majority opinion of this Court attempts to justify the denial of all relief to appellant, upon her third count against appellee Lilly Pack, *only,* on the ground that to permit the joinder of that count would destroy some immunity of the Government against suit, although that opinion, elsewhere, states that the claim of appellant, under the third count is "not a determination of a claim against the United States," and although the Government is not named as a defendant under that count and no relief is requested against it, thereunder.

Moreno v. U. S., 170 F. 2d 128 is cited in support of such conclusion. It is respectfully urged that such case is not in point and may be readily distinguished.

In the *Moreno* case, plaintiff sought to file an amendment to a complaint brought solely under 38 U. S. C. A. 445, for *alienation of affections*—a cause entirely foreign to the subject-matter of the action. As stated in that opinion, a trial thereon would have delayed and complicated the case. The evidence under the amendment could not have related, whatsoever, to the question of the plaintiff's rights under the insurance.

Also, in the *Moreno* case, the third-party defendant, Mrs. Bathurst, *objected* to the filing of the amendment. The Court had discretionary power to allow or deny the

amendment, under Rule 15(a), F. R. C. P. She did not consent to be sued in Massachusetts (she was a resident of New Jersey), under the proposed new count. And Rule 14(a), F. R. C. P., expressly prohibited bringing her into the action under the new count, as a third-party defendant, over her objection.

But, here, in *Pack v. U. S.*, the situation is wholly different.

Lilly Pack was named a defendant as to all three counts. *She made no objection* on the ground of misjoinder of causes or parties. She expressly consented to be sued in the Southern District of California. She pleaded, generally, to all three counts. She elected to defend all three. The third count related, directly, to the subject matter of the first two. *And the Government made no objection.*

Finally, the issue was neither complicated, nor delayed, by the joinder. All the facts were stipulated. The trial took less than one-half hour, on evidence applicable to all three counts. All that is left to be done is to remand the action, with instructions to the trial Court to grant appellant the relief to which she is entitled under the third count.

There is nothing in the *Moreno* case which even suggests that had the third-party defendant not objected to the amendment and urged improper venue as to the new cause of action sought thereby to be imposed, that the Court would not have had jurisdiction, particularly if she had pleaded to the amendment, had it been allowed. There is no question that a motion for a severance, made by the Government, would have been granted, had the amendment been allowed, and, properly under the facts and circumstances of that case.

Had this Court given appellant an opportunity to have done so, she would have called your Honors' attention to the recent decision of

> *Shaull v. U. S.* (C. C. A.-D. C., 1947), 161 F. 2d 891,

which is almost on "all fours" with *Pack v. U. S.*

In that case, as here, appellant, in an action against the beneficiary *and* the Government, sought to have it adjudicated that the named beneficiary held the proceeds from National Service Life Insurance *in trust* for appellant's children under an orally declared trust. There, as here, all of the facts were established. The only factual difference between the *Shaull* and *Pack* cases is that the trust was created by parol, in the *Shaull* case, whereas in the *Pack* case it was created by operation of law.

The Circuit Court for the District of Columbia reversed a judgment against appellant, and directed the trial Court to enter judgment recognizing and enforcing the trust as against the trustee, and directing the Government to pay the proceeds to him, *as trustee,* after he had qualified and given bond.

The Appellate Court, in the *Shaull* case, directly held that where jurisdiction is once acquired under 38 U. S. C. A. 445 (as here), the Court continues to retain jurisdiction to adjudicate *all claims* with respect to the policy, including an adjudication that the named beneficiary was, in law, a trustee and was not entitled to the proceeds to deal with as he saw fit.

The *Shaull* case—directly in point—also squarely holds that where the defendants "answered and pleaded to the

merits without reservation, they are for that reason also unable to challenge the court's jurisdiction over them."

Shaull v. U. S., 161 F. 2d 891, at 894.

The joinder was proper, regardless of the fact that one of the counts stated a cause of action against only one defendant (Lilly).

Hooper v. Lennen & Mitchell, 52 Fed. Supp. 319, affirmed (C. C. A. 9, 1944), 146 F. 2d 364.

Misjoinder of parties is not a ground for dismissal of an action. *If* objection had been timely made, on the ground that there was an improper joinder of the Government with another party, the claims could be separated for trial.

Lynn v. U. S. (C. C. A. 5, 1940), 110 F. 2d 586.

Nor may a complaint be dismissed and, as here, a party deprived of relief, because of a misjoinder of causes of action. If the causes cannot be conveniently tried together, separate trials should be ordered.

Schell v. Leander College (C. C. A. 8), 2 F. 2d 17.

The District Court did not consider that the trial of all three counts, below, would be impractical or inconvenient, or cause delay. Instead, all three were tried expeditiously, and at one time, *all without objection from any party, including the Government.*

Even IF objection had been timely made, below, and even IF the trial Court had found that a severance should have been ordered, he nevertheless should have later

ordered the actions tried together, since all counts would have common questions of fact, and law.

Rules 21 and 42(a), F. R. C. P.;

F. H. A. v. Christianson (1939), 26 Fed. Supp. 419.

The only different end result would be that there would have been two separate appeals made, instead of one. But, if the majority opinion is to stand, appellant has been denied all relief, wholly without regard to the merits of her claim, upon technicalities not raised by either of the appellees, either in the trial Court, or upon this appeal.

IV.

This Court Is Without Power to Consider Error Relating to Matters in Abatement Which Did Not Involve Jurisdiction.

The *effect* of the majority opinion is the same as IF appellee Lilly Pack had made timely objection, in the trial Court, seeking a dismissal as to the third count on the ground (1) that it was improperly joined; (2) that the venue would lie only in Missouri, and (3) that Lilly had been improperly joined as a defendant under that count and that the Government had also made a motion to dismiss the third count, and the pending appeal was one from an order of the trial Court dismissing or refusing to dismiss the third count on one or more of such grounds. *No such objections or orders were made, below.*

As more particularized under Point I, the District Court had jurisdiction over the cause or claim asserted in the third count, and over the parties. Objections as

to venue were waived. Appellee expressly consented to defend all three counts. Neither she nor the Government made a motion to dismiss or lodged any objection as to joinder of causes, joinder of parties, venue as to want of jurisdiction over the parties, or otherwise objected.

Each of such pleas are pleas or matters in abatement.

1 *C. J. S.*, Sec. 1(b), p. 27; Sec. 5, p. 32; Sec. 10, p. 38; Sec. 11, p. 39.

Since the effect of this Court's judgment is actually a reversal, as to the *third* count, predicated solely on "matters of abatement," none of which involve *jurisdiction,* to that extent this Court exceeded its statutory appellate powers.

28 U. S. C. A. (new) 2105:

> "There shall be no reversal in the Supreme Court of a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

28 U. S. C. A. 879 (former section):

> "There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

O'Brien's "Manual of Fed. App. Proc.," 1941 Ed., Chap. XVIII, p. 187, and cases there cited.

Conclusion.

The entire record on appeal—including the reporter's transcript of the half-hour trial—consists of only 37 pages.

The facts were clearly and concisely stated in the pleadings and the findings of fact, and were stipulated to.

Under the third count of the complaint (as to which the Government is not a party, and no relief is sought against it, thereunder), the following facts were stipulated:

1. Clyde and Angel were married in California, in 1932, had two children, and were residents thereof until he died.

2. In 1944, while in the armed forces, Clyde was issued a $10,000 policy of National Service Life Insurance and named his mother, Lilly, as beneficiary, without the consent of his wife. He died in 1945.

3. All of the premiums were paid with the community property of Clyde and Angel.

4. The Government has as yet made no payments to Lilly under the policy (thereby qualifying her to make an assignment to Angel under 38 U. S. C. A. 816).

5. Angel is a resident of California, and Lilly, of Missouri.

All of the parties admit that, under California's community property laws, Angel has a vested one-half interest in the insurance. (*Wissner v. Wissner,* 89 A. C. A. 857, 201 P. 2d 837, and other cases cited in appellant's opening brief).

The District Court had jurisdiction of the third count, under 28 U. S. C. A. (new) 1331 and 1332 and former 28 U. S. C. A. 41, as well as under 38 U. S. C. A. 445 (*Schaull v. U. S.*, 161 F. 2d 891). Lilly appeared and answered, without objection of any kind. She consented to defend all three counts. She waived any and every objection as to venue. She *and the Government* waived all objection as to joinder.

No severance was requested. No motion to dismiss was made on any ground.

It is urged that appellant should not have her rights cast aside, by a general affirmance, upon technical grounds, each of which was waived by the parties and none of them urged, below, or urged in this Court, and wholly without an opportunity to be heard.

Even IF the Court should have granted a severance (compare *Moreno v. U. S.*, and *Lynn v. U. S.*), had one been requested, appellant could have requested and undoubtedly would have been granted a consolidation, for trial, and her appeal would have squarely presented the same issues which she has raised, but which this Court has felt it should not meet because of non-jurisdictional procedural objections which this Court has raised, for the first time, but which were waived by the parties.

As a result of the majority opinion, following a judgment in the District Court against appellant, on the merits, appellant may be forever barred from again asserting a claim which (as between herself and Lilly), this Court has not passed upon.

Appellant respectfully urges that not only for herself and her two children, but *in the public interest*—in the interest of thousands of other widows of insured fighting men, similarly situated, residing in the "community property" states, that this Court should reconsider its judgment, as to the third count, and, in the words of Judge Stephens, direct the trial Court "by appropriate provision in the judgment" to "decree protection to the wife as to any interest she should have in benefits which may be paid to the mother."

The facts and the sole question of law under the third count are simple:

> *"As between the wife and the named beneficiary* (assuming that the wife cannot assert her vested interest in Government insurance as against the United States), *does the named beneficiary hold the wife's vested interest in the insurance and its proceeds in trust for the wife, if the insurance was purchased wholly with community property of the wife and the insured, and the wife did not consent to the designation of the beneficiary?"*

Appellant has heretofore presented authorities, in her briefs and oral argument, which she believes require an affirmative answer. In all events, she urges that the question be decided *on the merits*, in the public interest, particularly since the point is one of *first impression* in the Federal courts, and will directly concern thousands of other widows similarly situated.

For the reasons given, it is respectfully submitted that the petition for rehearing should be granted, and appel-

lant be afforded the opportunity of meeting the points and issues interposed, *sua sponte*, in the majority opinion, none of which were raised by either of the appellees and which *appellant has never had an opportunity to meet or answer*.

October 4, 1949.

Respectfully submitted,

SYLVESTER HOFFMANN,
IRVING G. BISHOP,
Attorneys for Appellant.

Certificate of Counsel (Rule 25).

We hereby certify that in our judgment the foregoing petition for a rehearing is well founded, and we further certify that it is not interposed for delay.

October 4, 1949.

SYLVESTER HOFFMANN,
IRVING G. BISHOP,
Attorneys for Appellant.